A **SOUTHERN PIPE INDUSTRY (M) SDN BHD**

v.

BARWILL AGENCIES SDN BHD & ORS

B HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-147-2001]
7 SEPTEMBER 2010

C ***TORT:*** *Negligence - Carriage of goods by sea - Barging of cargo - Cargo rolling overboard whilst being barged from vessel to wharf - Consignee suing shipping agent, barge operator and barge owner - Duty of care - Agency and liability - Whether barge operator a sub-agent of shipping agent or a substituted agent of charterer - Whether barge owner* D *a sub-agent of barge operator - Whether shipping agent and barge owner liable for negligence of barge operator - Res ipsa loquitur, whether doctrine applies*

TORT: *Negligence - Res ipsa loquitur - Application of doctrine, conditions for - Unavailability of evidence as to how loss occurred -* E *Carriage of goods by sea - Barging of cargo - Cargo rolling overboard whilst being barged from vessel to wharf*

SHIPPING: *Carriage of goods - Loss of goods - Barging of cargo - Cargo rolling overboard whilst being barged from vessel to wharf -* F *Consignee suing shipping agent, barge operator and barge owner - Agency - Whether barge operator a sub-agent of shipping agent or a substituted agent of charterer - Whether barge owner a sub-agent of barge operator - Duty of care - Whether shipping agent and barge owner liable for negligence of barge operator - Bailment and possession*

G

AGENCY: *Principal and agent - Substituted agent - Principles - Test to be applied - Whether barge operator a sub-agent of shipping agent or a substituted agent of charterer - Extent of control - Barge operator appointed by shipping agent with approval of charterer - Whether barge* H *owner a sub-agent of barge operator - Duty of care and negligence in loss of cargo during barging - Contracts Act 1950, ss. 143, 144, 147*

BAILMENT: *Bailment for reward - Possession - Barge operator taking possession of cargo upon discharge from vessel - Whether barge operator* I *a bailee - Whether shipping agent and barge owner were bailees - Cargo rolling overboard whilst being barged from vessel to wharf - Negligence and duty of care*

The plaintiff was the consignee of 273 coils of hot-rolled steel sheets ('the coils') shipped on board the *Arctic Trader* ('the vessel') from Rio De Janeiro to Butterworth, Penang. The 1st defendant, a local shipping agent, was engaged by the charterer of the vessel to transport the coils from the vessel to a wharf at Butterworth. Whilst the 2nd defendant, a barge operator, was ferrying the coils from the vessel to the wharf (on a barge owned by the 3rd defendant), 35 of the coils fell overboard.

The present claim against the three defendants in negligence was brought by the insurers of the plaintiff on a subrogation (having satisfied a claim under the marine policy concerned). The total amount claimed was RM956,957.08 (being the amount the insurers paid out). The 2nd defendant did not defend the claim and judgment was entered against it. The principal issues that fell for determination before the High Court were: (i) whether the plaintiff had proved that it suffered losses amounting to RM956,957.08; (ii) whether the 2nd and/or 3rd defendants were the agents of the charterer or whether they were the agents or sub-agents of the 1st defendant; (iii) whether the defendants were the bailees of the cargo upon its discharge from the vessel at Butterworth; and (iv) whether it was the defendants' negligence that caused the loss of the coils, and whether *res ipsa loquitur* applied in favour of the plaintiff.

Held (dismissing the claim against the 1st and 3rd defendants):

(1) The plaintiff had proved that it suffered losses amounting to RM956,957.08. This was well substantiated by all the relevant documents as exhibited. (para 7)

(2) It was not in dispute that the 1st defendant was the agent of the charterer, and that the 2nd defendant was only appointed or engaged by the 1st defendant with the approval of the charterer. (para 8)

(2a) The 2nd defendant had merely hired the barge from the 3rd defendant (bare-boat charter). There was no indication of a sub-agency arising as between the 2nd and 3rd defendants within the meaning of s. 144 Contracts Act 1950 – and bearing in mind the restriction in s. 143 thereof. The 3rd defendant was thus not a sub-agent of the 2nd defendant.

There was also no evidence that the 3rd defendant had been appointed by the charterer or by the 1st defendant; hence, it was also neither an agent of the charterer nor a sub-agent of the 1st defendant. (paras 9 & 14)

(2b) Pursuant to s. 147 Contracts Act 1950, the 2nd defendant was an agent or substituted agent of the charterer/principal in relation to the barging operations. Applying the 'extent of control or direction test' enunciated in *The United States of America v. Shearn Delamore & Co and Drew & Napier; Joseph Lee Henn Shen (Third Party)* HC, it was clear that, although the 2nd defendant was physically appointed by the 1st defendant, it was the charterer which had control over the 2nd defendant. The 1st defendant did not undertake to appoint the 2nd defendant on its own accord; it had to seek and obtain the approval of the charterer to appoint the 2nd defendant. There was no delegation of the 1st defendant's powers or duties to the 2nd defendant. The legal relationship/agency was, thus, not as between the 1st and 2nd defendants but between the charterer and the 2nd defendant. (paras 10-13)

(2c) Owing to holdings (2), (2a) and (2b) above, the 1st and 3rd defendants could not be held responsible or liable for the acts or omissions of the 2nd defendant from an agency point of view. Their negligence, if any, would have to be proved separately by the plaintiff. (para 15)

(3) The cargo was discharged directly from the vessel to the barge under the control and charge of the 2nd defendant. The 2nd defendant was thus the bailee of the coils – having assumed possession of them – and not the 1st or 3rd defendants which did not have possession of, or control over, the cargo. (paras 16 & 17)

(4) *Res ipsa loquitur* could not be prayed in aid of the plaintiff's case as there was actual evidence as to how the 35 coils fell off the barge. It was a pre-condition to the application of the doctrine that there was no evidence as to how the loss occurred. (paras 18-19)

(4a) In arranging for the 2nd defendant's appointment, the 1st defendant's fundamental duty of care was to the charterer, *ie*, to ensure that the 2nd defendant was properly licensed by the port authority to undertake such barging operations and that it had the competency to do so. The duty of care to ferry the coils safely from the vessel to the wharf was the sole responsibility of the 2nd defendant. The 1st defendant was not liable to the plaintiff for the acts/omissions (negligence) of the 2nd defendant. (para 21)

(4b) The duty was on the 2nd defendant, and not on the 3rd defendant, to determine the loading capacity of the barge and to not overload it. There was also no evidence from the plaintiff that the 3rd defendant's barge was not seaworthy. Insufficient or improper lashing and stowing of the cargo had caused the barge to tilt and the coils to roll overboard; the 2nd defendant was negligent. In any case, the 3rd defendant having parted with possession and control of the barge (in favour of the 2nd defendant which assumed full control of it as demise charterer or owner pro hac vice) could not be held liable for the loss of the coils. (paras 23-25, 27 & 29)

[Plaintiff's claim against 1st and 3rd defendants failed. Judgment entered against 2nd defendant.]

Case(s) referred to:

Gilchrist Watt & Sanderson Pty Ltd v. York Product Pty Ltd [1970] 2 All ER 825 ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 SC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Ng Ben Thong & Ors v. Krishnan Arumugam [1997] 1 LNS 85 HC ***(refd)***

Plantation Agencies Sdn Bhd v. Hji Ariffin Hji Ismail [1978] 1 LNS 145 FC ***(refd)***

Port Swettenham Authority v. TW Wu And Co (M) Sdn Bhd [1978] 1 LNS 146 PC ***(refd)***

T Krishen & Co (a firm) v. Birkart South East Asia Re Ltd (Dyna Movers Pte Ltd, third party) [1997] 1 SLR 105 ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

The Baumwell Manafactur Von Carl Scheibler v. Christopher Furness [1893] AC 8 ***(foll)***

The United States of America v. Shearn Delamore & Co And Drew & Napier; Joseph Lee Henn Shen (Third Party) [2007] 4 CLJ 154 HC ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 143, 144, 145(i), 147, 148, 183
Evidence Act 1950, ss. 102, 103

Other source(s) referred to:
Clerk and Lindsell on Torts, 18th edn, p 410

For the plaintiff - Prakash Menon (Geetha Subramaniam with him); M/s Isharidah Ho Chong & Menon
For the 1st defendant - Arun Krisnanlingam; M/s Sativale Mathew Arun
For the 3rd defendant - Cynthia Lee (Gerald Mak with him); M/s Ban Eng Annual & Foong

Reported by Gan Peng Chiang

JUDGMENT

Chew Soo Ho JC:

[1] Plaintiff's claim is brought by the insurers of the plaintiff on a subrogation in respect of a claim arising from the loss of cargo at sea for which the insurers had satisfied the claim under a marine policy.

[2] The plaintiff was the consignee of 273 hot rolled steel sheet in coils ("the cargo") which were shipped on board the "Arctic Trader" vessel from Rio De Janeiro, Brazil to Butterworth, Penang. On account of draft restriction, the vessel was unable to berth at the Butterworth Deep Water Wharf to discharge the cargo upon its arrival at Butterworth.

[3] 1st defendant, a local shipping agent, was engaged by the charterer of the vessel Messrs. SK Shipping Co Ltd of Seoul, Korea, to provide transportation of the hot rolled steel sheet in coils from the vessel to the Butterworth Deep Water Wharf. The 2nd defendant, a barge operator, was then engaged to ferry the cargo from the vessel to the wharf. On 27 December 1997 at about 2pm, while the 2nd defendant was ferrying the cargo using the 3rd defendant's barge known as perfect 1203, 35 rolls of the cargo fell into the sea and could not be retrieved.

[4] Hence plaintiff claimed under subrogation for the total sum of RM956,957.08 being the sum paid by the insurers for the lost cargo and all incidental expenses incurred in investigating the claim

and in salvaging the lost cargo, together with interest. The 2nd defendant did not defend the claim and judgment has been duly entered against them.

The Issues

[5] A number of issues have been raised in this trial but I find suffice to deduce them into the following four main issues:

1. Whether the plaintiff had proved that they suffered losses amounting to RM956,957.08.
2. Whether the 2nd and 3rd defendants were the agents of the principal SK Shipping Co Ltd of Seoul, Korea or whether they were the agents or sub-agents of the 1st defendant who was the agent of SK Shipping Co Ltd, the principal or otherwise.
3. From the discharge of the cargo from the vessel "Arctic Trader" upon arrival at Butterworth, was the 1st defendant or the other defendants the bailees of the cargo?
4. Were the defendants negligent in causing the loss of the cargo resulting in the plaintiff suffering losses and were consequently liable to the plaintiff? Can *res ipsa loquitur* be applicable?

Evaluations & Findings

1st Issue: Whether The Plaintiff Had Proved That They Suffered Losses Amounting To RM956,957.08

[6] There is no dispute that the plaintiff was the consignee of 273 hot rolled steel sheets in coils in the bill of lading P2 supported by the purchase order P3, commercial invoice P4 and the conformity certificate P5. From P9, the coil receipt listing, it shows the details of the 35 coils missing and the total weight of them is 686.09 MT (metric tonne).

[7] Through the evidence of PW2, the Assistant General Manager of Hong Leong Assurance Bhd (HLA), Northern Region, it shows that HLA has issued a Marine Cargo Policy C397CC002100 (P12) to the plaintiff on 2 December 1997 to insure the plaintiff's purchase of 5,178.16 MT (273 coils) of hot rolled steel sheets in coil that were to be shipped from Rio De Janeiro to the plaintiffs premises in Butterworth. The cargo was

insured for USD1,936,628.10 or equivalent RM6,886,649.52 at the exchange rate of RM3.556 at the material time. On 27 December 1997, 35 coils of the cargo fell into the sea while being ferried from the vessel to the port using a barge towed by tug boats. For the loss of these 35 coils, plaintiff as the insured put up their claim with HLA. Based on the purchase order P3, the coils cost USD340 per MT and the value for the total loss of 686.9 MT was USD233,270.60. HLA then engaged the services of loss adjusters named Thomas Howell Group (M) Sdn Bhd to conduct an investigation. Thomas Howell engaged Allied Marine Equipment Sdn Bhd's Matal Trading Sdn Bhd, a firm of divers to conduct searches and the services of Inspectorate (Malaysia) Sdn Bhd, a firm of marine surveyors to conduct the investigation. From the report of Thomas Howell's investigation, it appears that the steel coils were not properly stowed on board the barge and as a result they rolled heavily and momentarily to the port and starboard which caused the steel coils to shift to the port side and fall overboard when the barge was hit by a strong wave. Seabed searches conducted by Allied Marine between Wharf 2, 3, 4 and near the ferry terminal failed to locate and recover the missing coils. For the services of Allied Marine and Inspectorate, HLA paid to them RM8,400 (P18A-C) and RM1,476.20 (P19) respectively making up a total of RM9,876.20. HLA paid a total sum of RM34,619.60 to Thomas Howell which included divers' fees of RM13,400 and marine surveyors' fees of RM1,476.20 (P20). After the investigation and the futile attempt to salvage the lost coils, HLA settled the loss to the plaintiff in the sum of RM912,461.28 as full and final settlement of the plaintiff's claim (P21 and P10). HLA had incurred a total sum of RM956,957.08 from the payments made to the plaintiff, Thomas Howell, Allied Marine and Inspectorate. HLA is claiming this exact sum under subrogation. I hold that plaintiff has proved the losses amounting to RM956,957.08 which is well substantiated by all the relevant documents as exhibited.

2nd Issue: Whether The 2nd And 3rd Defendants Were The Agents Of The Principal SK Shipping Co Ltd Of Seoul, Korea Or Whether They Were The Agents Or Sub-agents Of The 1st Defendant Who Was The Agent Of SK Shipping Co Ltd Or Otherwise

[8] The fact that the 1st defendant was the agent for SK Shipping Co Ltd of Seoul, Korea is unequivocal. There is no challenge on the evidence of DW1, 1st defendant's Branch

Manager at Penang at the material time who said that 1st defendant was the agent of the charterer, SK Shipping Co Ltd of Korea. The Time Charter, D28, shows SK Shipping through a charter party dated 1 October 1997 between Atlantic Bulk Carriers Ltd and SK Shipping Co Ltd, had chartered the vessel named Arctic Trader. Through Barwill Korea, Barwill (1st defendant), at Port Klang was approached to act as the port agents for the vessel. Barwill Port Klang accepted the appointment and forwarded a pro forma disbursement account to the principal, SK Shipping (Telex: D29). Since the cargo from the vessel was to be discharged at Butterworth, Barwill Penang took over the port agent's role to arrange for the discharge of the cargo from the vessel to the wharf at Butterworth. Due to draft restriction, the vessel could not come into berth at Butterworth upon its arrival. Accordingly, Barwill Penang advised the principal that they had to arrange for the discharge of the cargo from the vessel by barging and for that they (1st defendant) would proceed to arrange for the barges (Telex: D30). 1st defendant then contacted the 2nd defendant and sought a quotation for the provision of barges and tugs. On 10 December 1997, 2nd defendant submitted their written quotation of RM16 per metric tonne (D31) which was informed to SK Shipping by the 1st defendant via telex D32A. 1st defendant had also informed their principal that the plaintiff had surrendered the bill of lading (D32B). According to DW1, the branch manager of the 1st defendant, the principal had approved the appointment of the 2nd defendant to provide the barging services. He stated that the 2nd defendant was appointed because 2nd defendant had the resources to do the discharge by barges and the 1st defendant had used them previously without any problems. More importantly, 2nd defendant was licensed by Harbour Master to operate barging and they had the permit to operate in the port. The position of the 2nd defendant, therefore, is that they were appointed or engaged by the 1st defendant on the approval of the principal SK Shipping Co Ltd. This fact does not seem to be disputed.

[9] As to the 3rd defendant, according to DW1, he was not aware that the 2nd defendant would have to engage a barge (perfect 1203) from the 3rd defendant. It was the 2nd defendant which appointed the 3rd defendant, the dumb barge owner. DW1 nevertheless endorsed that it was part of the contract that the 3rd

defendant was the sub-agent of the 2nd defendant. Although DW2, the managing director of the 3rd defendant had denied any knowledge of the dumb barge perfect 1203 being used by the 2nd defendant for their operation on 27 December 1997 stating that their said barge was chartered on daily basis to one Nico Sim of Messrs Mikawa Agency of No. 43, Lorong Langsat 2, 14000 Bukit Mertajam, Seberang Perai, there was, as admitted by DW2 no evidence to substantiate his evidence as no such daily charter or any documents were produced nor was the said Nico Sim called to confirm the charter between the 3rd defendant and Mikawa Agency particularly in relation to the charter on 27 December 1997. There is an unexplained gap in the 3rd defendant's case as to how their dumb barge perfect 1203 could end up in the hands of the 2nd defendant to ferry cargo on 27 December 1997. By the fax transmission D46 dated 27 January 1998, the 3rd defendant had written to the 2nd defendant requesting 2nd defendant to issue an official letter of undertaking to the repairer of their barge perfect 1203; this letter clearly states that the said barge was hired by the 2nd defendant. It is clear from this D46 that the 3rd defendant's barge was in fact hired by the 2nd defendant may it be through Mr Nico Sim or any other. Bereft of any evidence that Nico Sim or Mikawa Agency chartered or hired the said barge, the reasonable conclusion from D46 is that the 2nd defendant had hired the barge from the 3rd defendant. Nico Sim if he exists, could probably be construed as an intermediary for the said hiring to both the 2nd and 3rd defendants. However, D46 did not indicate any form of sub-agency but that the barge was hired to 2nd defendant. Sub-agent is defined under s. 144 Contracts Act 1950 as "a person employed by, and acting under the control of the original agent in the business of the agency." The mere hiring of their barge to the 2nd defendant without the 3rd defendant being involved in the operation of the barge does not constitute a sub-agent nor can the 3rd defendant be reasonably inferred as a sub-agent in law to the agent who is the 1st defendant herein or the 2nd defendant (as discussed below).

[10] As stated above, the role of the 1st defendant as an agent for the disclosed principal is not an issue. The issue is whether 2nd defendant is also an agent of the principal or that they were the sub-agent of the 1st defendant. Learned counsel for the 1st

defendant submitted that from the evidence of DW1 which was substantially unchallenged, 1st defendant appointed the 2nd defendant with the knowledge and approval of the principal and it was the exact fees quoted by the 2nd defendant that the 1st defendant billed the principal. 1st defendant also continued to take instructions from the principal on the payment of the 2nd defendant's invoice by remitting the invoice to the principal. He submitted that 2nd defendant was thus appointed as agent of the principal SK Shipping and contended that if the 1st defendant was the principal in appointing the 2nd defendant, the amount billed to SK Shipping would be different in that the 1st defendant would have to make a profit on that transaction and there would be no need for the 1st defendant to take instructions from SK Shipping on whether to pay the 2nd defendant or not. In this respect, s. 147 of the Contract Act 1950 is relevant. It provides:

> 147. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, that person is not a sub-agent, but an agent of the principal for such part of the business of the agency is entrusted to him.

[11] In *The United States of America v. Shearn Delamore & Co And Drew & Napier; Joseph Lee Henn Shen (Third Party)* [2007] 4 CLJ 154, His Lordship Vincent Ng J (as he then was) after deliberating on the law of agency, held, *inter alia*:

> ...
>
> (2) Based on the authorities, the question of whether a party is an agent or sub-agent or substituted agent of the principal largely depends on the extent the principal has control or direction over the party.
>
> ...

[12] That seems to be the 'test' to apply ie, to what extent the principal has control or direction over the party. At p. 178 and 182, His Lordship Vincent Ng J had considered the question of privity of contract or the creation of a legal relationship between the principal or agent with sub-agent or a substitute agent as envisaged in s. 147 and 143 of the Contracts Act 1950 and the circumstances these privity of contract could be created when he said at p. 178:

e) As a general rule, an agent cannot, without authority from his principal, devolve upon another, obligations to the principal which he himself has undertaken to fulfil personally. (*Mahinder Das v. Mohan Lal* 180 IC 617; AIR [1939] A 188). Even where, after employment of the sub-agent, he and the principal correspond directly, that fact does not convert the sub-agent into a substituted agent spoken of under s. 147 of our Contracts Act (Indian Contracts Acts, s. 194). Nor does mere knowledge of the principal regarding the sub-agency create any direct privity of contract between the principal and the sub-agent. But, in special circumstances, it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Such a substitute is not a sub-agent but an agent of the principal.

f) Section 143 (Indian Contracts Acts, s. 190) lays down that, ordinarily, an agent may not delegate his powers or duties to another person, if he has undertaken to exercise or perform them himself personally unless he has express or implied authority from his principal to do so. Whenever delegation is authorized and is duly exercised, a legal relationship is created between the principal and the substitute. Besides the relationship of principal and agent is created between the agent and the person to whom he delegates his powers or duties.

and at p. 182, His Lordship continued:

v) The fact that the agent was expressly or impliedly authorised to employ another does not affect the question but what has to be determined is: whether the agent was authorised to employ him as his own assistant or agent or as the assistant or agent of the principal? To create privity of contract between the principal and the person employed, it is not sufficient that the principal has consented to the appointment, inasmuch as the principal may consent to the appointment of a person as his own agent or as the sub-agent. Consent to delegation is not the same as the consent to substitute, and it is the latter which creates privity of contract. (*Central Bank of India v. Firm Rur Chand Kurra* Mal AIR [1958] Punj 159).

w) Whenever there is a question of privity of contract, it resolves itself into: whether the principal consented, expressly or impliedly, to the appointment of the person selected by the agent as his own agent, or only as the agent's agent, or in other words, whether the person employed by the agent

> acted under the control of the principal or of the agent. If, from the facts and circumstances of a particular case, it appears that the agent employed the person for the principal and, by his authority express or implied and he is subject to the principal's control, then he is the agent of the principal and there is privity of contract between him and the principal. But if, on the other hand, the agent, having undertaken to transact the business of his principal, employed the sub-agent on his own account to assist him in what he has undertaken to do, even though with the consent of the principal, the risk is his, and there is no privity of contract between such a sub-agent and the principal and the sub-agent is the agent of the agent only. (*New Zealand & Australia Land Co v. Watson* 7 QBD 374 CA).

[13] I wish to adopt the law on agent, sub-agent or substitute agent as succinctly set out and illustrated above and the 'test' thereof by His Lordship Vincent Ng in *The United Stated of America v. Shearn Delamore & Co (supra)* as they are directly relevant to the instant case. It is a fact that the 1st defendant in their role as port agent did not personally undertake the role of carrier or operator of barges and tugs. As explained by DW1, their role was basically for the arrangement of the vessel's berthing, for the arrangement of the discharge of the cargo, for the provision of bunkers, fuel oil, food, water etc to the vessel, master and crew. Since the vessel could not berth at Butterworth, barging services were necessary to discharge the cargo on board the vessel to the wharf. Hence approval from SK Shipping was sought and obtained to appoint the 2nd defendant to ferry the cargo by barging after quotation of 2nd defendant's fees were agreed by the principal. Instruction on payment or non-payment to the 2nd defendant was also from the principal. In the circumstances, applying the 'control or direction' test as laid down by His Lordship Vincent Ng J *(supra)*, I am inclined to find that the fact that SK Shipping retained the right to give direction as to payment or non-payment of 2nd defendant's invoice apart from their initial consent to the barging charges at RM16 per MT indicates that they had the control over the 2nd defendant although 2nd defendant was appointed physically by the 1st defendant which however had to seek instruction and obtain approval from the principal. Consequently, I hold that pursuant to s. 147 Contracts Act 1950, the 2nd defendant was the agent or substitute agent of the principal in relation to the barging

operation. By the fact that barging services would have to be consented and approved by the principal and that the 1st defendant did not undertake to appoint the 2nd defendant on their own accord indicates that the 1st defendant's role as port agent did not include barging services. Hence the appointment of the 2nd defendant does not constitute the delegation of the 1st defendant's powers or duties to the 2nd defendant. Thus a legal relationship is created between SK, Shipping and the 2nd defendant as the agent or substitute agent of the principal, SK Shipping; see s. 147 Contracts Act 1950.

[14] In relation to the 3rd defendant, there is no evidence of their appointment by the principal SK Shipping or by the 1st defendant for and on behalf of the principal. On the above finding, I find that the 3rd defendant is not an agent of the principal nor a sub-agent of the 1st defendant. The 3rd defendant's evidence was solely that another party named Nico Sim had hired his barge and that he had no knowledge as to how his barge had ended up in the hands of the 2nd defendant. However, apart from such assertion there is absolutely no evidence whether oral or in writing to show that the barge was indeed hired to Nico Sim of Mikawa Agency. I find that the 3rd defendant had failed to satisfy their onus of proof to rebut the fact that they had nothing to do with the 2nd defendant when their barge was used by the 2nd defendant; s. 102 and 103 Evidence Act 1950; *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31 SC, Be that as it may, the 2nd defendant as found by this court was a substitute agent of the principal for undertaking the barging services of the cargo from the vessel to the wharf at Butterworth. As a substitute agent, the 2nd defendant cannot lawfully employ another to perform acts which they have expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade, a sub-agent may, or, from the nature of the agency, a sub-agent must be employed; see s. 143 Contracts Act 1950. There is however no evidence before this court that the nature of the 2nd defendant's substitute agency that a sub-agent must be employed. In the circumstances, the 3rd defendant cannot be construed as a sub-agent of the 2nd defendant as this would have infringed s. 143 Contracts Act 1950 which renders such appointment unlawful. Plaintiff submitted that *vide* 1st defendant's amended statement of defence at para 6 and 7, the 1st defendant had pleaded specifically that the 2nd and 3rd defendants were

appointed as sub-agents for the vessel "Arctic Trader" and that they were appointed upon express authority by the principal SK Shipping for and on behalf of "Arctic Trader". Nevertheless, at para. 7 of the said amended statement of defence, it was also specifically pleaded that the 2nd and 3rd defendants are not agents of the 1st defendant. If the pleaded fact of the 1st defendant is accepted, the 3rd defendant could probably be, as pleaded, the sub-agent of the principal SK Shipping for and on behalf of "Arctic Trader". This contention, nevertheless, does not make sense as the 3rd defendant could either be the sub-agent of the 1st defendant if so appointed by the 1st defendant (see s. 144 Contracts Act 1950) or the sub-agent of the 2nd defendant if as appointed by the 2nd defendant which, however, may be unlawful pursuant to s. 143 Contracts Act 1950. The 3rd defendant could not be the sub-agent of the principal as under s. 144 Contracts Act 1950, a "sub-agent" is defined as a person employed by, and acting under the control of, the original agent in the business of the agency. Although the principal is bound by and responsible for the acts of the sub-agent under s. 145(i) Contracts Act 1950, that itself does not endorse the fact that the 3rd defendant is the sub-agent of the principal by definition. Further, there is absolutely no evidence to establish the fact of the appointment of the 3rd defendant as an agent or sub-agent of the principal and the 2nd defendant was not called to lead any evidence as to whether 3rd defendant was appointed by them as sub-agent as their trade may so require. This court is left with grave doubt as to the capacity of the 3rd defendant in this respect when the 3rd defendant appeared to have no knowledge how their barge could end up in the hands of the 2nd defendant as they alleged that the said barge was in fact hired to Mikawa Agency. Though this court has found 3rd defendant to have failed to adduce sufficient evidence that they had nothing to do with the 2nd defendant when their barge was indeed used by the 2nd defendant to ferry the cargo, the overall evidence did not show whether the 3rd defendant was appointed as a sub-agent in this case. D46 also did not show any agency relationship but a mere hiring. This court cannot therefore come to a finding of fact of any agency relationship, if it exists, between the 3rd defendant and 2nd defendant or the 1st defendant. Plaintiff had agreed to this 2nd issue being one of the issues to be tried *vide* the 'statement of issues to be tried', they did not contend that this is non-issue from paras. 6 and 7 of the

amended statement of defence. Plaintiff should be estopped from so raising the pleaded facts in paras. 6 and 7 above in submission; see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 FC. In any event, there was no clear admission by the 1st defendant that the 2nd and 3rd defendants were 1st defendant's agent or sub-agents as pleaded and it remained an issue to be determined. On a balance of probabilities, I find that the 3rd defendant could not be the agent of the principal nor could they be the sub-agent of the 2nd defendant pursuant to s. 143 Contracts Act 1950 or the sub-agent of the 1st defendant.

[15] Consequently, I hold that the 2nd defendant is not a sub-agent of the 1st defendant but an agent or substitute agent of the principle and the 3rd defendant is not a sub-agent of the 1st defendant nor a sub-agent of the 2nd defendant. The 1st defendant and the 3rd defendant could not be held responsible and liable for the acts and omissions of the 2nd defendant from this agency point of view. Their negligence must be distinctly and separately proved by the plaintiff.

3rd Issue: Was The 1st Defendant Or The 3rd Defendant The Bailee Of The Cargo From Its Discharge From The Vessel "Arctic Trader" Upon Arrival At Butterworth

[16] The undisputed evidence is that the cargo was discharged directly from the vessel to the barge under the control and charge of the 2nd defendant who were the bailees for reward and who had the possession of the cargo till the time 35 rolls of the steel sheets in coils fell off the barge into the sea when they were being ferried to the Butterworth wharf. Possession of the cargo had passed into the hands of the 2nd defendant. Obligation will and can only be created by the delivery and assumption of possession of the bailment in the absence of any other evidence. Since the bailment had not come into the possession of the 1st defendant nor did the 1st defendant take delivery of them or have control of them, the 1st defendant is not the bailee in the instant case and I agree with the 1st defendant's submission that the plaintiff's cause of action against the 1st defendant for bailment must fail; see *Gilchrist Watt & Sanderson Pty Ltd v. York Product Pty Ltd* [1970] 2 All ER 825. I find that 1st defendant acted as the facilitator and the 2nd defendant who received and took possession of the cargo was the bailee in the instant case. In *T Krishen & Co (a firm) v. Birkart South East Asia Re Ltd (Dyna*

Movers Pte Ltd, third party) [1997] 1 SLR 105, the Singapore Court of Appeal had dealt with this issue of bailment and the law related thereto at p. 110 as follows: A

[21] A bailment arises when one person (the bailee) is voluntarily and knowingly in possession of the goods of another (the bailor) (*Palmer on Bailment – The Laws of Australia* (1994 Ed) at Ch 8.5 p. 9). This principle derived its support from the decision of the Privy Council in *KH Enterprise (cargo owners) v. Pioneer Container (owners)* [1994] 2 All ER 250 in which Lord Goff, at p. 262 stated: B C

> ... a person who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner).

[22] See also *Compania Portorafti Commercial SA v. Ultramar Panama Inc* [1990] 2 Lloyd's Rep 395. Palmer thus notes at p. 9: D

> The modern emphasis is on the voluntary nature of the possession gained. The mere fact of voluntary and knowing possession is sufficient to constitute the possessor a bailee. *Neither delivery to the bailee, nor any specific undertaking by the bailee to hold on behalf of the bailor, is necessary if the bailee consents to having possession.* Such a party becomes a bailee regardless of the machinery by which his or her possession was acquired. (emphasis added) E F

[23] The fact remains that the appellants had never parted with actual physical possession of the goods. Thus, the respondents were undeniably not actual bailees. Under the general law, the element of possession remains an essential element in determining whether a bailment has been established (see *Australian Guarantee Corp Ltd v. Ross* [1983] 2 VR 319; *Shipbuilders Ltd v. Benson* [1992] 3 NZLR 549). See also *Hobbs v. Petersham Transport Co Pty Ltd* [1971] 124 CLR 220 at p. 238 where Windeyer J said: G H

> A carrier to whom goods are delivered for carriage is a bailee. But a person who undertakes that he will carry goods is not a bailee of them unless they be actually delivered to and received by him.

[24] Palmer in p. 21 thus states the general proposition that 'where a tangible chattel exists, but the party sought to be made liable as a bailee acquires no possession of it, there is generally no bailment'. However, Palmer goes on to state as follows: I

> ... A relationship akin to bailment might also arise where the party engaged to procure the carriage of goods does not acquire possession personally, but lawfully delegates the task to a subcontractor who takes possession. Such a party has been called a 'quasibailor'. The intermediate party's position is analogous to that of a bailee, at least for the purpose of rendering that party answerable for the faults of the subcontractor. (emphasis added)

[17] Possession of the cargo in the present case is undoubtedly an essential element in determining whether a bailment has been established. To reiterate, the 1st defendant and for that matter the 3rd defendant as well were not in possession and control of the cargo and there is no evidence of any conduct to indicate they assumed the role of the bailee; the 2nd defendant as found by this court above is an agent or substitute agent of the principal; the 2nd defendant was not the sub-agent of the 1st defendant nor their subcontractor to render the 1st defendant to be a 'quasibailor' as stated in *Palmer (supra)* at p. 21. Therefore, upon a finding of fact, the 1st defendant cannot be held to be the bailees of the cargo in this case; the actual bailee is the 2nd defendant.

4th Issue: Were The Defendants Negligent In Causing The Loss Of The Cargo Resulting In The Plaintiff Suffering Losses And Were They Consequently Liable To The Plaintiff? Can The Maxim Of Res Ipsa Loquitur Be Applicable?

[18] Save for the various reports upon inspection or survey conducted by Allied Marine & Equipment Sdn Bhd for Thomas Howell Group Sdn Bhd (exhs. P14, P15, P16), by Inspectorate (Malaysia) Sdn Bhd (exh. P7) and by Intertek Testing Services (exh. P24), there is no direct evidence as to how the incident of 35 roles of steel sheets in coils had fallen into the sea during the barging. Does *res ipsa loquitur* apply in this present situation? There are three conditions that must be satisfied before *res ipsa loquitur* can be applied. These conditions are well set out in *Clerk and Lindsell on Torts*, 18th edn. p. 410 to be:

1. The occurrence is such that it would not have happened without negligence;

2. The thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; and

3. There is no evidence as to why or how the occurrence took place; if there is such evidence, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on such evidence.

[19] These three conditions are conjunctive and cumulative. The 1st defendant submitted that since there is evidence on how and why the occurrence of the 35 missing coils took place, the plaintiff cannot rely on the doctrine of *res ipsa loquitur*. From the various reports referred to above coupled with the police report P6, I agree with 1st defendant's submission that the 3rd requirement above-quoted has not been satisfied to warrant *res ipsa loquitur* to apply in favour of the plaintiff's case. It is thus necessary for the plaintiff to prove the negligence of each and every of the defendants *vis-a-vis* their respective roles whether they were in fact negligent in the conduct of their duty of care in relation to the 35 rolls of steel sheets in coils that were lost in the sea. There is no dispute as to these missing 35 rolls of steel coils.

[20] Was the 1st defendant negligent as per the particulars pleaded by the plaintiff?

[21] The role of the 1st defendant was as port agent for SK Shipping, the carrier, who was obligated under the bill of lading to deliver the goods to the plaintiff at the Butterworth wharf; they also arranged for barging operator to be appointed for the delivery of the cargo from the vessel Arctic Trader to the wharf since they do not undertake barging operation. Evidence does not show that the 1st defendant as port agent was contractually bound to deliver the cargo. This can be envisaged from the fact that 1st defendant had to seek consent and approval from SK Shipping in appointing 2nd defendant to undertake the barging operation to transport the cargo from the vessel to the wharf. The contractual duty is still vested in SK Shipping while the 1st defendant's role was to facilitate such delivery and appointment of the 2nd defendant which is a process to facilitate this delivery as 1st defendant does not operate barging services themselves. They are thus only responsible to SK Shipping as to the progress of the barging operation performed by the 2nd defendant. I do not find that the 1st defendant is under a duty to ensure how the 2nd defendant is to perform the barging operation under such circumstances. In arranging for the 2nd defendant to be appointed, the fundamental

duty of care of the 1st defendant is to the principal to ensure that the 2nd defendant was a properly licensed operator with the appropriate permits from the Penang Port to undertake such port operations and had the competency to do so. Once an operator is so licensed with the appropriate permits to operate port services coupled with the experience as 1st defendant had used their service previously and were satisfied with them, it must be reasonably assumed that the operator (2nd defendant) would have all the relevant and appropriate facilities and competency to undertake the task to receive the cargo from the vessel and to deliver the cargo safely to the wharf for which his licence and/or permits have sanctioned him to undertake such operation. Pursuant to s. 148 Contracts Act 1950, in selecting such an agent (2nd defendant) for their principal, an agent (1st defendant) is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if they do this, they are not responsible to the principle for the acts or negligence of the agent so selected. In the circumstances of this case, I do not find that the role of ensuring the safety of the cargo which must be vested in the 2nd defendant can be attributed to the 1st defendant as the 1st defendant could not be expected to have capacity and competency to know and ensure the safety when they themselves were not so licensed nor possessed the permits to undertake and operate such port operations especially so when they do not conduct carriage. The duty of care to deliver the cargo safely from the vessel to the wharf must therefore be the sole duty and responsibility of the 2nd defendant. The duty of care of the 1st defendant is to the principal to exercise their discretion as a man of ordinary prudence would exercise in his own case. To reiterate, the 1st defendant had used the services of the 2nd defendant and were satisfied with them. The 2nd defendant had the licence and permit to operate port services. In the circumstances, the 1st defendant can be said to have exercised due diligence and prudence in selecting the 2nd defendant to conduct the barging services. Although the 1st defendant may be responsible to monitor or supervise the work done by the 2nd defendant for and on behalf of the principal, yet pursuant to s. 183 of the Contracts Act 1950 which provides that where the contract is entered into by an agent for a disclosed principal, the agent has no personal liability even if he supervised the work performed under the contract; see *Plantation*

Agencies Sdn Bhd v. Haji Ariffin Haji Ismail [1978] 1 LNS 145 FC 1st defendant therefore cannot be held liable to the plaintiff for the acts or omissions or negligence of the 2nd defendant. A

[22] The 2nd defendant had failed to attend the trial and hence no evidence had been led by them to rebut the negligence alleged by the plaintiff against them. In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, the Federal Court held *inter alia*, that the respondent who refused to attend court and studiously refrained from giving evidence, adverse inference ought to be drawn against him and the evidence of the appellant ought to be presumed to be true. 2nd defendant who failed to attend the trial must therefore be held to have been negligent in the conduct of their barging operation resulting in the loss of the 35 rolls of steel in coils. In *Port Swettenham Authority v. TW Wu And Co (M) Sdn Bhd* [1978] 1 LNS 146, the Privy Council held, *inter alia*, that at common law the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agent to whom he has entrusted the goods for safe keeping. Accordingly, 2nd defendant is liable to the plaintiff for the loss of the 35 rolls of steel in coils, for which judgment had been duly entered. B C D E

[23] As to the 3rd defendant, from the various particulars of negligence pleaded against the 3rd defendant, the plaintiff's main contention of 3rd defendant's negligence is that the 3rd defendant's barge was not seaworthy and that they had failed to determine the dead weight or loading capacity of the barge at the time of loading the cargo from the vessel to the barge. In this respect, the burden is on the plaintiff to prove the negligence of the 3rd defendant as they alleged; pleadings are not evidence but a bare averment of a party's case; the party has to adduce evidence to substantiate its pleadings; see *Ng Ben Thong & Ors v. Krishnan Arumugam* [1997] 1 LNS 85; the burden does not vest in the 3rd defendant to prove that the said barge hired to the 2nd defendant was seaworthy nor that they had to determine the weight of the cargo to be loaded to correspond with the loading capacity of the barge. Evidence in this case does not show that the 3rd defendant knew of what cargo or its weight to be loaded onto the barge nor was the 3rd defendant involved in the loading operation of the cargo from the vessel to the barge. The 3rd F G H I

defendant merely hired out the dumb barge without any crew or in other word, a bare boat charter. It is an undisputed fact that it was the 2nd defendant which undertook the role of barging operation and had control of the said barge to receive the cargo loaded onto it. The duty is thus on the 2nd defendant to ensure the loading capacity of the barge and not to overload it.

[24] On the issue of seaworthiness, plaintiff did not adduce any evidence to establish the meaning and extent a barge is construed as seaworthy. This court cannot act on mere conjectures or surmises or suspicions. According to DW2, the 3rd defendant's sole witness, the barge had been in use and it was afloat signifying it was seaworthy. Indeed, from the investigation or survey report of how the incident occurred in this case, the cargo was loaded onto the said barge and it was then towed by tug boats; when the barge was at a distance of 300 yards nearing the wharf on a easterly course, it began rolling and subsequently tilted heavily to its port side, as a result, the cargo began rolling to that side and subsequently, the port side wall gave way and resulted in the loss of the steel coils on board. It was found that the cargo on board the barge was not lashed; although few pieces of wooden chocks were found on the barge, they were insufficient to prevent the cargo being held into place and as a result of the rolling action and the subsequent shifting, it caused the side board to collapse which resulted in the eventual loss of the cargo on board; see P24, the report from Intertek testing services. P24 also gave the time that the barge left the vessel after being loaded at 1335 hours on 27 December 1997 and the incident occurred at about 1400 hours. This investigation in fact attributed the cause of the incident to the insufficiency of lashing of the cargo on board the barge. There is nothing to signify that the barge is unseaworthy. DW2's evidence that the barge was seaworthy as it was afloat and could be used was indeed consistent with the fact that the barge was able to be used by the 2nd defendant as it was able to ferry the cargo loaded on board. If the cargo were safely and properly stowed and lashed, I am inclined to opine that most probably, this incident might not have occurred. Similarly in P17, a survey report by Inspectorate (Malaysia) Sdn Bhd which conducted a survey of the said dumb barge showed that they had never been asked to determine the seaworthiness of this barge nor had they concluded that it was unseaworthy. Plaintiff's contention is thus dubious and unsustainable. I find that plaintiff has failed to prove this allegation of negligence in total.

[25] On the question of the weight of the cargo to ensure no overloading, the fact that the 3rd defendant did not undertake the barging operation which was the whole function of the 2nd defendant as they were solely appointed for that purpose indicates that there is no duty on the 3rd defendant which merely hired out their barge to determine the weight of the cargo and to ensure the barge was not overloaded; that would be the work and the duty of the 2nd defendant. From the evidence before this court, the loss of the cargo was not due to the fact that the barge had capsized because of overloading or that overloading was a contributory factor. The barge had never capsized. Hence even if the cargo load was over the permissible weight, it is not the cause and cannot be construed as an act of negligence leading or contributing to the loss of the said 35 roles of the cargo. Learned counsel for the 3rd defendant submitted that the owner of the ship who has parted with possession and control of the ship under a charter party to the charterer is not liable for the loss of the goods shipped under the bills of lading signed by the captain who is the servant of the charterer and not of the owner although the shipper of the goods had no notice of those facts referring to the House of Lords case of *The Baumwell Manafactur Von Carl Scheibler v. Christopher Furness* [1893] AC 8. The position of the 3rd defendant is quite akin to *Baumwell*'s case in that the 3rd defendant as the owner of the barge had parted possession and control of it to the 2nd defendant who is termed as a demise charterer or an owner *pro hac vice* and who assumed full control of the barge in the barging operation of the cargo unloaded from the vessel *Arctic Trader*; the 3rd defendant in such circumstances is not liable for the loss of the cargo conveyed using the barge by the 2nd defendant. I find merit in such submission. The 3rd defendant cannot be liable for the acts or omissions of the 2nd defendant when the 3rd defendant had not only parted possession and control of the barge over to the 2nd defendant but also had no knowledge nor involved in the operation of the delivery of the cargo from Arctic Trader to the Butterworth wharf. In any event there is absolutely no evidence that the cause for the 35 roles of the cargo rolling off the said barge was due to the barge being overloaded. I do not find merit in such contention by the plaintiff to prove negligence against the 3rd defendant.

[26] Apart from the above two main contentions by the plaintiff, I find that the plaintiff had failed to prove the other particulars of negligence as pleaded against the 3rd defendant.

[27] In summary, I hold that the plaintiff had failed to prove the respective negligence of the 1st defendant and the 3rd defendant distinctly.

Conclusion

[28] I find the above issues to be sufficient for the determination of this case against the 1st and 3rd defendants and find no necessity to consider other minor issues raised by the parties herein.

[29] For the reasons advanced in the preceding four issues and the findings of this court as above, I conclude that the plaintiff had failed to prove the negligence of the 1st and 3rd defendants for the loss of the 35 hot-rolled steel sheets in coils and thus had failed to prove their claim on a balance of probabilities. I therefore order that the plaintiff's case against the 1st and 3rd defendants be dismissed with costs of RM15,000 to each of them.